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# DOMA and the Internal Revenue Code

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# DOMA AND THE INTERNAL REVENUE CODE

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## INTRODUCTION

The battle for marriage equality is in full strength. For four years Massachusetts was the only state in the country to recognize marriages between persons of the same sex.[1] In the last year, top appellate courts in California,[2] Connecticut,[3] and Iowa[4] have joined the Supreme Judicial Court of Massachusetts to extend full marriage equality to same-sex couples. And in April 2009 the Vermont legislature enacted a bill, overriding the governor's veto, extending full marriage equality to same-sex couples.[5]

* Inez Mabie Distinguished Professor of Law, Santa Clara University. I am delighted to participate in this symposium in honor of my tax colleague, Professor Jeffrey Sherman. Jeff's scholarship over the years has been extremely useful to me in my own teaching and scholarly endeavors and I am especially grateful to him for his willingness to respond to my questions about same-sex couples and employee benefits. I only wish I understood ERISA as well as he does.

This paper has improved over time as a result of presentations at workshops at U.C.L.A., the Northern California Tax Roundtable (hosted at Hastings), and the University of Chicago. A special thank you to the three tax professors who commented at these workshops, Ted Seto, David Gamage, and Julie Roin, as well as to Kirk Stark (U.C.L.A.) and Mary Anne Case (Chicago) for the invitations to present to their classes. And for providing me with written comments on earlier drafts, I am indebted to Fred Hertz, Andy Koppelman, and Jean Love.

1. *See* Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003). The court ruled that the California constitution prevented the state from refusing to issue marriage licenses to same-sex couples and then stayed the effect of its opinion for six months. Same-sex couples began marrying in Massachusetts on May 17, 2004.

2. *In re* Marriage Cases, 183 P.3d 384 (Calif. 2009). On November 4, 2008, the people of California voted in favor of an initiative (Proposition 8), which amended the state constitution to provide that "only marriage between a man and a woman is valid or recognized in California." CALIF. CONST. art. I, § 7.5. The California Supreme Court upheld the validity of Proposition 8 in *Strauss v. Horton*, 207 P.3d 48 (2009), but also ruled that the measure could not be applied retroactively to void marriages validly entered into between June 16 and November 5, 2008. A new lawsuit challenging Proposition 8 under the federal constitution has been filed in federal court. Complaint, Perry v. Schwarzenegger (N.D. Cal. May 22, 2009) (No. CV 09 2292) *available at* http://www.equalrights foundation.org/ press.html.

3. Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008).

4. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

5. Vermont Law No. 3 (2009), amending 15 VT. STAT. ANN. §8. As this article was in final edit, the Maine legislature passed a marriage bill that was signed by the governor on May 6. However on November 3, the voters in Maine repealed the measure at the ballot boxes. New Hampshire has enacted a marriage equality bill that becomes effective on January 1, 2010, and the District of Columbia City Council voted to recognize same-sex marriages from other jurisdictions. The New York State Assembly has also approved a same-sex marriage bill. Stories about these events are generally available on the

Most LGBT activists predict that it is only a matter of time before all states recognize such marriages. However, given the number of states that have passed constitutional amendments banning recognition of marriage between same-sex partners,[6] it seems likely that the federal courts will need to establish the principle of marriage equality under the federal constitution before the country is likely to experience any semblance of uniformity on this issue.

An early test of the federal constitution's promise for marriage equality has recently been filed in federal district court in Boston, Massachusetts.[7] The case, *Gill v. Office of Personnel Management*, is not a case directly claiming that lesbian and gay people have a right to marry under the federal constitution. Rather, it is a case that challenges the constitutionality of the federal Defense of Marriage Act (DOMA).

In 1996, Congress passed the Defense of Marriage Act (DOMA), prohibiting the federal government from recognizing same-sex marriages for any purposes related to federal law.

The operative language is found in section 3 of DOMA and codified at 1 U.S.C. § 7. It provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[8]

The other part of DOMA (section 2) deals with the interstate recognition of same-sex marriages under the Full Faith and Credit Clause of the Constitution. Section 2 purports to empower states to refuse to recognize same-sex marriages from other states if they so desire.[9] Many academics

web at http://www.windycitymediagroup.com.

6. Ten states have adopted constitutional amendments that ban same-sex marriages. Nineteen additional states have adopted constitutional provisions that ban same-sex marriage as well as other forms of official recognition. *See, e.g.*, ban the recognition of any form of status for same-sex couples. See, for example, KENTUCKY CONST. § 233A, stating that: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."

7. Complaint for Declaratory, Injunctive, or Other Relief and for Review of Agency Action, Gill v. Office of Personnel Mgmt., (D. Mass. filed March 3, 2009). A copy of the complaint is available on GLAD's web page, www.glad.org (last visited April 25, 2009). As this article was going to press, the state of Massachusetts filed a separate challenge to Section 3 of DOMA, claiming that it violates the Tenth Amendment and the Spending Clause. Commonwealth of Massachusetts v. U.S. Dept. Health and Human Services. A copy of this complaint can also be found on GLAD's web page at http://www.glad.org/uploads/docs/cases/comm-v-usdhhs-complaint-07-2009.pdf.

8. Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2006).

9. 28 U.S.C. § 1738C (2006).

have commented on this part of DOMA, generally concluding that the Full Faith and Credit Clause does not require one state to recognize marriages from other states and thus this part of DOMA is unnecessary.[10] Whether or not section 2 is also unconstitutional has been the subject of additional debate, and while that debate is interesting as an academic matter, it seems to me to be less of a problem for same-sex married couples than section 3. I say this because section 2 does not require nonrecognition of marital status. It leaves states free to choose whether to recognize same-sex marriages from other states or not and in what circumstances they might recognize such marriages. However, solely because of DOMA, the federal government can never recognize a same-sex marriage, even when it might be prudent to do so. The breadth of section 3 strikes me as not only unwise, but also as unconstitutional.

The case filed in Boston challenges only Section 3 of DOMA. The challenge is on grounds that the provision violates the equal protection clause of the federal constitution. Two of the couples in the original filing of this lawsuit specifically challenge the application of DOMA to provisions of the Internal Revenue Code.[11] Another couple will join the suit as soon as the Internal Revenue Service rejects their amended return, which claims that since they are married they should not have to pay extra income tax and payroll taxes on the value of the health insurance provided by one spouse's employer to their family.[12]

10. *See* Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS LAW REV. 313, 326 (2006).

11. Melba Abreu and Beatrice Hernandez challenge DOMA as preventing them from filing their tax return jointly, using the joint filing rates under I.R.C. § 1. They have been together for over twenty-one years and have been married since May, 2004. Each year they file tax returns as single taxpayers. They timely filed amended tax returns for 2004, 2005, and 2006, claiming that they should be allowed to file jointly. For these three years, the ability to file jointly would entitle them to a tax refund of more than $14,000. Their amended returns were rejected by the IRS solely on the basis of DOMA.

Mary Ritchie and Kathleen Bush have been together for nineteen years and married in May of 2004. Mary is a State Police Sergeant and Kathleen stays home to take care of the couple's two school-age children. Because they have children, Mary was able to take advantage of the slightly lower rates for Head of Household filing status in I.R.C. § 1. Nonetheless, she has paid at least $8,000 more in income taxes for the years 2004–2006 than she would have paid if she had been allowed to file jointly. She filed amended returns, claiming joint filing status with her spouse. The IRS denied these returns solely on the basis of DOMA. The two couples are primarily challenging the application of the rate structure which requires them as two single taxpayers to pay a higher amount in tax than if they could file jointly. Another couple will join the suit, challenging the taxation of imputed income from employer provided domestic partner benefits under §§ 105 and 106 of the Internal Revenue Code.

12. Mary Bowe-Shulman, a lawyer, has employer-provided health coverage for her spouse, Dorene. Under I.R.C. §§ 105 and 106, the fair market value of that coverage is taxable income to Mary solely because DOMA refuses to treat Dorene as her spouse. *See* Press Release, Gay & Lesbian Advocates & Defenders (GLAD), GLAD Files Lawsuit Challenging Denial of Critical Federal Benefits to Married Same-Sex Couples (Mar. 3, 2003), *available at* http://www.glad.org/uploads/docs/press-releases/2009-03-03-DOMA.pdf; Email from Mary Bonauto to Patricia Cain (Mar. 3, 2009) (on file

All of the plaintiffs are challenging DOMA "as applied" to their specific fact situations, meaning that they do not necessarily challenge all applications of DOMA to the Internal Revenue Code. I agree with that argument, although I would go further and argue that DOMA is unconstitutional as applied to the entire Internal Revenue Code. In other words, DOMA, as a tax statute is unconstitutional on its face.

However, that argument may be difficult to make in a litigated case. First of all, the Supreme Court is very reluctant to rule statutes facially invalid.[13] Second, tax litigation is constrained by a number of procedural rules that give taxpayer standing solely to challenge provisions that cause them harm. Thus, a court may not be willing to consider arguments about the overall effect that DOMA has on the Internal Revenue Code in the context of a case in which plaintiffs have standing only to challenge a handful of Code provisions.[14]

On the other hand, making an "as-applied" challenge creates a different set of problems. DOMA's application to the tax code produces harm for some same-sex couples and benefits for others. In fact, it can produce some harms and some benefits for the same couple. Being treated as unmarried for tax purposes can harm a couple in which both spouses work if the income is split unevenly. Such couples, if married, typically pay a lower tax bill using the joint return rates rather than each having to file as single taxpayer. But that same couple can take advantage of being unmarried for tax purposes in certain ways. For example, one spouse might pay for and claim all the itemized deductions, leaving the other spouse with the right to claim the standard deduction. The Code prohibits this option for married taxpayers who file separately.[15] These mixed effects of DOMA are not unlike the mixed effects of tax law generally on married couples. Opposite-sex married couples have challenged the Code provisions that discriminate against them, claiming violations of their constitutional rights. All such claims have failed. The courts have ruled consistently that tax law is rational even

with author).

13. United States v. Salerno, 481 U.S. 739 (1987) is usually cited for this proposition. In *Salerno*, the Court said that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenge must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. However, constitutional law scholars have pointed out that this statement is an overstatement and that it rarely applies to equal protection challenges. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333 (2005).

14. *See, e.g.*, Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978) and discussion *infra* at note 130.

15. *See* I.R.C. § 63(c)(6).

though it creates benefits for some couples and detriments for others.[16]

The challenge in *Gill* seems different from the marriage penalty cases, however. In *Gill*, the question is not whether classifying on the basis of marriage is rational even though it creates penalties as well as benefits. Rather, in *Gill*, the question is whether, having decided to classify on the basis of marriage, Congress has any rational basis for excluding valid, enforceable same-sex marriages from the classification. I think the best way to show the absurdity of such an exclusionary rule is to consider DOMA's overall effect on the Tax Code. I am concerned, however, that a taxpayer in a litigated case, hampered by standing rules and making an as-applied challenge, may not have the leeway to argue about DOMA's overall effect on the Code.

But as a scholar I am not similarly constrained. The purpose of this article, therefore, is to make the argument that I think needs to be made: DOMA, as applied to the Internal Revenue Code as a whole, is unconstitutional because it lacks a rational basis.

Let me explain, up front, that my constitutional argument about § 3 has nothing to do with whether Congress has the power to enact such legislation. Congress, after all, does have the power to levy taxes and control our borders. Thus, Congress should have the power to determine which married couples can file a joint return and which non-citizen spouses can be given preferential treatment for immigration purposes.[17] Rather than a question of power, my constitutional focus is based on the Equal Protection Clause[18] and cases like *Romer v. Evans*[19] which say that overly broad exclusions from equality suggest that the legislative action might be based on fear and animus rather than rationality. To be more specific, my argument is that DOMA, as applied to federal tax law, is simply so irrational that it can only be explained as being motivated by animus.[20]

16. *See, e.g.*, *Mapes*, 576 F.2d at 896; Druker v. Commissioner, 697 F.2d 46 (2d Cir. 1982); Johnson v. United States, 422 F. Supp. 958 (D. Ind. 1976).

17. *But see* Dominick Vetri, *The Gay Codes: Federal & State Laws Excluding Gay & Lesbian Families*, 41 WILLAMETTE L. REV. 881, 919–20 (2005) (making the point that even if Congress does have the power to define spouse for tax purposes (that is, in the exercise of a plenary power), it may have more limited power when it comes to defining marriage in the exercise of concurrent powers).

18. U.S. CONST. amend. XIV, § 2. Since DOMA is federal legislation, its constitutionality under *Romer v. Evans*, 517 U.S. 620 (1996), will be tested under the equality principles of the Fifth Amendment's Due Process Clause, rather than under the Equal Protection Clause of the Fourteenth Amendment.

19. 517 U.S. 620 (1996).

20. I have outlined the contours of this argument elsewhere. At its core, the argument is that even if the ends are legitimate, DOMA is not a rational means for attaining those ends. *See* Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 843 (2008).

In Part I of this article, I will develop the substantive argument in greater detail. Part II of this article will outline the procedural difficulties that arise for taxpayers who wish to make constitutional arguments against tax statutes. Finally, however, the point of this focus on DOMA and the Internal Revenue Code is to show that DOMA is bad tax policy.[21] Even if no court is willing to find DOMA unconstitutional, Congress should repeal DOMA, at least as applied to tax law. In Part III, I assume that we will one day have a world without DOMA. In that world, new tax policy issues will arise. I conclude that a repeal of DOMA is not a sufficient remedy for the numerous tax problems faced by same-sex committed couples, and I suggest that it is time for Congress to tackle these problems by asking why marriage matters in tax law and whether it should matter as much as it currently does. While this article does not propose a complete solution, it does raise questions that should be of interest to Congress as it faces a future unconstrained by DOMA.

## I. DOMA IS UNCONSITUTIONAL AS APPLIED TO THE INTERNAL REVENUE CODE

### *A. DOMA: What Is It and Where Did It Come from?*

DOMA sprang to life in 1996, in reaction to the looming threat that Hawaii might be forced by its supreme court to recognize same-sex marriages against the will of the legislature and the people of Hawaii.[22] The proposed legislation, House Bill 3396,[23] was introduced in May 1996, but it can be traced back to the Republican presidential caucuses in Iowa, which had been held in February of that year. At the time of the Iowa caucuses, all GOP presidential candidates except for Richard Lugar endorsed a gay-bashing statement made at a rally at the First Federated Church in Des Moines.[24] The effect was to make same-sex marriage a central issue in the upcoming presidential campaign. Within months, bills forbidding same-sex marriage were introduced in thirty-four states. Fifteen states adopted the

21. *See.e.g.*, William Kratzke, The Defense of Marriage Act (DOMA) is Bad Income Tax Policy, 35 U. MEM. L. REV. 399 (2005).

22. In *Baehr v. Lewin*, the Supreme Court of Hawaii held that denying marriage to same-sex couples required proof of a compelling state interest. 852 P.2d 44, 67 (Haw. 1993). The trial on this "compelling state interest" issue was scheduled for the fall of 1996. *See Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 51 (1996) (statement of Terrance Tom, Hawaii State Rep.) [hereinafter *House Hearings*].

23. H.R. 3396, 104th Cong.(1996).

24. *See House Hearings, supra* note 22, at 44–45 (Prepared Statement of the National Gay and Lesbian Task Force); Frank Rich, *Journal: Bashing to Victory*, N.Y. TIMES, Feb. 14, 1996, at A21.

legislation.[25]

From the time it was introduced at the federal level, DOMA enjoyed broad bipartisan support, including a promise from President Bill Clinton that he would sign the law if it was presented to him.[26] By April of 1996, polls clearly favored the Democrats and Clinton was so far ahead of Senator Bob Dole, the likely Republican nominee, that it seemed unlikely the Republicans would regain the White House.[27] The Republicans needed an issue to sidetrack the voting public, something emotional that would capture their attention and would cast the Republicans as firmly in control of a major issue. Same-sex marriage became that issue. The Supreme Court of Hawaii had ruled that same-sex couples were entitled to their day in court. The State of Hawaii had been ordered to present its case at trial, justifying the exclusion of gay and lesbian couples from marriage, and it had been instructed that it must provide a compelling state justification for this exclusion. The case was scheduled for trial in the fall of 1996.[28] The House and Senate hearings are replete with complaints from witnesses that a handful of unelected judges from Hawaii were about to determine the meaning of marriage for the entire country.[29]

The polls on same-sex marriage at this time showed at least 70% of the voters were opposed to the idea.[30] The issue was so volatile that most politicians, even those well ahead in the polls, wanted to avoid being tainted as someone who supported same-sex marriage. As a result, even President Clinton, a president who had been more supportive of the lesbian and gay community than any other president before, readily acknowledged

25. ALASKA STAT. § 25.05.013 (2008); ARIZ. REV. STAT. § 25-101 (2008); DEL. CODE ANN. tit. 13, § 101 (2008) ; GA. CODE ANN. § 19-3-3.1 (2008); IDAHO CODE § 32-209 (2008); 750 ILL. COMP. STAT. 5/212 (2008); KAN. STAT. ANN. § 23-101 (2008); MICH. COMP. LAWS §§ 551.1, 551.271 (2008); MO. REV. STAT. § 451-022 (2008); N.C. GEN. STAT. § 51-1.2 (2008); OKLA. STAT. tit. 43, § 3.1 (2008); 23 PA. CONS. STAT. § 1704 (2008); S.C. CODE ANN. § 20-1-15 (2008); S.D. CODIFIED LAWS § 25-1-1 (2008); TENN. CODE ANN § 36-3-113 (2008). A sixteenth state, Utah, had already adopted similar legislation in 1995. UTAH CODE ANN. § 30-1-2 (2008).

26. *House Hearings*, *supra* note 22, at 2.

27. *Republicans Doleful over Turn of Events*, DALLAS MORNING NEWS, Apr. 29, 1996, at 11A.

28. *See House Hearings*, *supra* note 22, at 51.

29. *See, e.g.*, *id.* at 52 (statement of Terrance Tom, Hawaii State Rep.); *id.* at 127 (statement of Dennnis Prager, Radio Talk Show Commentator); *id.* at 215 (statement of Jay Alan Sekulow, Chief Counsel, American Center for Law and Justice); *Senate Hearings*, *infra note 48, at 23* (statement of Gary Bauer, President, Family Research Coiuncil).

30. *See* Alan Matsuoka, *Gay Unions Score Low in Star-Bulletin Poll*, HONOLULU STAR-BULL., Mar. 29, 1996, http://archives.starbulletin.com/96/03/29/news/story1.html. In Honolulu, where the debate over same-sex marriage was perhaps most frenzied due to the Hawaii court case, a poll by the Honolulu Star Bulletin in March of 1996 showed 74% were opposed to same-sex marriage and 66% were opposed to the creation of domestic partnership status with many, but not all, spousal benefits. *See id.*

his willingness to sign such a bill if it passed the Congress.[31] All of these conditions set the stage for the introduction of DOMA in May 1996 and its subsequent passage. DOMA was passed by the House of Representatives on July 12, by the Senate on September 10, and signed by President Clinton on September 21. The House vote was 342–67 and the Senate vote was 85–14.[32]

### *B. Legislative History of DOMA*

While the vote on DOMA was quick and lopsided, there is some legislative history. In the House, the Subcommittee on the Constitution, a subcommittee of the Committee on the Judiciary, held hearings on May 15, approximately one week after the bill had been introduced. Representative Charles Canady of Florida chaired the subcommittee and opened with a statement that summarized the need for section 3 of DOMA as follows:

> I expect—and, in fact, I hope—that most Americans will think it quite odd that we are actually considering legislation to define marriage as an exclusively heterosexual and monogamous[33] institution. Simply stated, in the history of our country, marriage has never meant anything else. It is inherently and necessarily reserved for unions between one man and one woman. This is because our society recognizes that heterosexual marriage provides the ideal structure within which to beget and raise children. This fundamental, unavoidable fact of our human nature belies any attempt to betray this bill as a defense of some archaic social construct. Marriage exists so that men and women will come together in the type of committed relationships that are uniquely capable of producing and nurturing children. This is the simple wisdom reflected in section 3 of the act.[34]

Chairman Canady also warned that the bill needed to be passed immediately, before the Hawaii same-sex marriage case was finalized, because of the danger that marriages valid in Hawaii would immediately be transported to other states. In effect, three judges on the Supreme Court of Hawaii[35] were about to force same-sex marriage on both the federal

31. *See supra* note 26.

32. 142 CONG. REC. H7480-05 (daily ed. July 12, 1996); 142 CONG. REC. S10129-01 (daily ed. Sept. 10, 1996).

33. In fact, the bill did not define marriage as monogamous. Representative Schroeder introduced an amendment that would have made monogamy part of the federal definition, but her motion was voted down. *See* H.R. REP. NO. 104-664, at 44 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2947 [hereinafter HOUSE REPORT].

34. *House Hearings*, *supra* note 22, at 1–2 (statement of Rep. Charles T. Canady, Chairman, Subcomm. on the Constitution, H. Comm. on the Judiciary).

35. There are five justices on the Supreme Court of Hawaii and, thus, a three judge majority is generally necessary for a final ruling. In *Baehr v. Lewin*, however, only two judges ruled that the mar-

government and forty-nine additional sister states. Chairman Canady explained, "And make no mistake about it, that is the strategy that gay-rights lawyers have been pursuing. They have made no attempt to conceal that strategy. They intend to wage a concerted legal battle to force other States to recognize same-sex marriage licenses obtained in Hawaii."[36] To emphasize his point, he then inserted a twenty-three page internal memo from Lambda Legal Defense and Education Fund, prepared by Lambda attorney Evan Wolfson.[37] This memo set forth all the possible legal arguments for extra-territorial recognition of Hawaiian same-sex marriages, including a possible strategy of asserting full faith and credit claims. Numerous subsequent witnesses pointed to this memo as proof that the gay rights litigators intended to push Hawaiian same sex marriages on the rest of the country, thereby forcing forty-nine unwilling states and a federal government to recognize such marriages.

Most of the testimony focused on the full faith and credit provisions of section 2 of the Act. The primary arguments in favor of section 3, the federal definition of marriage, were that the definition accurately reflected 200 years of congressional thinking on marriage, that Congress should not have a new definition of marriage forced upon the numerous federal laws it had passed without intending to include same-sex couples, and that DOMA was sufficiently flexible because, after all, Congress was free to change its mind and include same-sex couples in federal laws whenever it wished.[38]

Very little attention was given to the possible violations of equal protection.[39] *Romer v. Evans*[40] had yet to be decided at the time of the House Hearings, although it was handed down shortly thereafter on Monday, May 20.[41] One witness in the House hearings who testified in support of DOMA identified *Romer* as a case that could affect the question of whether failing

riage laws were subject to strict scrutiny. *See* 852 P.2d 44, 48, 67 (Haw. 1993). A third judge concurred in the result and agreed that the case needed to be tried rather than dismissed because he agreed there were material issues of fact. *Id.* at 68. But the third judge withheld judgment about the appropriate level of scrutiny. *See id.* at 70. Upon request for rehearing, newly appointed Justice Paula Nakayama, who had not been part of the original panel, joined the two judge plurality, agreeing that strict scrutiny was the appropriate level of review. *See* 852 P.2d at 74–75.

36. *House Hearings*, *supra* note 22, at 2 (statement of Rep. Charles T. Canady, Chairman, Subcomm. on the Constitution, H. Comm. on the Judiciary).

37. *House Hearings*, *supra* note 22, at 9.

38. *See House Hearings*, *supra* note 22, at 167–75 (prepared statement of Lynn D. Wardle, Professor of Law, Brigham Young University School of Law).

39. The Fourteenth Amendment does not apply to Congress. Thus, the equal protection violations of DOMA are lodged in the due process clause of the Fifth Amendment.

40. 517 U.S. 620 (1996).

41. *Id.*

to recognize same-sex marriages was constitutionally permissible. Professor Hadley Arkes of Amherst College testified that:

> If the Court makes that move [i.e., striking down the amendment to the Colorado Constitution at issue in *Romer*], it will affect profoundly this matter of gay marriage because it will remove the prop under which the States may refuse to credit marriages from other States. Under the full faith and credit clause, we would expect that States would be obliged to respect these marriages from outside unless there is some ground of moral objection that may be expressed in public policy. But with the [*Romer*] decision in Colorado, that ground of exception would be removed.[42]

However, in Professor Arkes' view, a gay-favorable ruling in *Romer* would be an unwarranted exercise in the "flexing of judicial power,"[43] thereby making DOMA even more necessary as a legislative curb on such power.[44]

The House Report, submitted on July 9, appears to concur with Professor Arkes' view. It included a "Short Note on *Romer v. Evans*," which characterized the decision as "elusive," and then proceeded to criticize the decision, claiming it was inconsistent with the holding in *Bowers v. Hardwick*,[45] which the Court had not yet overruled.[46] The Report concluded that there were four justifications for DOMA:

1. Defending the institution of traditional heterosexual marriage;
2. Defending traditional notions of morality;
3. Protecting state sovereignty; and
4. Preserving government resources.[47]

The Senate Hearings were held on July 11, 1996, before the Senate Committee on the Judiciary. Senator Orrin Hatch, Chairman of the Committee, presided.[48] Following Senator Hatch's opening statement, he pre-

42. *House Hearings*, *supra* note 22, at 87 (statement of Hadley Arkes, Edward Ney Professor of Jurisprudence and American Institutions, Amherst College).

43. *Id.* at 106.

44. *See id.* at 106–07.

45. 478 U.S. 186 (1986). *Bowers* held that Georgia's sodomy statute could be justified by the state based on concerns about public morality. *Id.* at 196. While it was a due process case, *id.* at 189, the case had been widely cited for the proposition that moral disapproval was a sufficient rational basis for laws that discriminated against gay men and lesbians.

46. *See* HOUSE REPORT, *supra* note 33, at 31–33.

47. *Id.* at 12.

48. *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. (1996) [hereinafter *Senate Hearings*].

sented a letter from the U.S. Department of Justice dated May 29, 1996, which concluded that the proposed bill was constitutional and stated that President Clinton would sign the bill if passed in its current form. The letter included the following statement: "As stated by the President's spokesman Michael McCurry on Wednesday, May 22, the Supreme Court's ruling in *Romer v. Evans* does not affect the Department's analysis (that [the Defense of Marriage Act] is constitutionally sustainable) . . . ."[49]

The decision in *Romer v. Evans* was handed down on Monday, May 20, 1996.[50] Within days, the Department of Justice had concluded that the decision had no effect on the constitutionality of DOMA. The Senate Hearings occurred months later. Several witnesses addressed the possible effect of the *Romer* holding on DOMA. Testifying in favor of DOMA and concluding that *Romer* was not a constitutional obstacle were Gary L. Bauer, President of the Family Research Council, a Christian organization that supports traditional family values, and Professor Lynn D. Wardle of Brigham Young University, an expert in family law who often writes and speaks on traditional family values.[51] A letter was submitted on behalf of Professor Michael W. McConnell, a constitutional law expert and, at that time, a faculty member at the University of Chicago.[52] Testifying against DOMA and raising *Romer* as a possible constitutional concern was Professor Cass Sunstein of the University of Chicago, another constitutional law expert.[53] A prepared statement was submitted on behalf of the American Civil Liberties Union (ACLU).[54]

Bauer's testimony set forth no legal theory but instead railed against the "destructive trend" of judges who "usurp . . . power" and "tyrannize an already besieged moral code."[55] Professor Wardle opined that merely defining marriage the way it had been defined for 200 years could not possibly constitute discrimination.[56] And Professor McConnell noted that the rational justification required under *Romer* was met by protecting the states

49. *Id.* at 2.

50. 517 U.S. 620, 620 (1996).

51. *See Senate Hearings*, *supra* note 48, at 19, 23, 40.

52. *See id.* at 56–59. McConnell is now a federal judge on the United States Court of Appeals for the Tenth Circuit.

53. *See id.* at 42–43.

54. *Id.* at 75–78. In addition, a *New York Times* editorial by Harvard law professor Laurence Tribe was introduced. *See* Laurence H. Tribe, Editorial, *Toward a Less Perfect Union*, N.Y. TIMES, May 25, 1996, § 1, at 11, *reprinted in Senate Hearings*, *supra* note 48, at 55. The Tribe editorial took the position that Congress did not have the power to enact section 2 of DOMA. *Id.* at 56. It was silent as to the effect of *Romer* on either section 2 or section 3. *Id.* at 55–56.

55. *Senate Hearings*, *supra* note 48, at 23.

56. *See id.* at 25.

in their individual decisions about how to define marriage.[57] None of this testimony comes close to analyzing *Romer*'s effect on section 3 of the Act. While section 3 might be characterized by Professor Wardle as a mere restatement of a centuries' old definition, it is more accurately characterized as a notable break with tradition by providing that the federal government will no longer treat state-recognized marriages the same as it has always treated them. It is this change that needs justification and to state that marriage has always been viewed as a union between a man and a woman is a mere statement of fact, not a justification.

Professor Sunstein's testimony focused on this change, this singling out of same-sex marriages.[58] He noted that Congress had never before singled out any marriages for special federal legislative treatment, even those that have been widely condemned such as incestuous marriages and bigamous marriages.[59] Instead, as he pointed out, decisions about what sorts of marriages are valid have been traditionally left to the states.[60] The real question about constitutionality was whether or not this singling out of same-sex marriages could be justified.[61] The ACLU's statement concluded that it could not, quoting from Justice Holmes:

> It is revolting to have no better reason for a rule of law than that [so it was] laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[62]

No witnesses addressed the specific question I pose in this article: is there a sufficient constitutional justification for adopting a rule that refuses to recognize same-sex marriages for purposes of federal tax law? No tax experts were consulted in either the House or Senate Hearings. Tax law was rarely mentioned.[63]

In the debates on the floor of the Senate, Senator Robert Byrd of West Virginia, one of the co-sponsors of the bill, made the following statement:

> I urge my colleagues to think of the potential cost involved here. How

57. *Id.* at 58.

58. *Id.* at 47–48.

59. *Id.* at 48. But note that the federal government was heavily invested in the 19th century rejection of polygamy and so federal deference to state law has not been uniformly true throughout history.

60. *Id.* at 47.

61. *Id.*

62. *Id.* at 77 (quoting OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 187 (1920)).

63. Patricia Schroeder did make a statement during the House Hearings, identifying the fact that the federal tax law was not always beneficial to spouses. *See House Hearings*, *supra* note 22, at 35 (statement of Rep. Patricia Schroeder, Member, Subcomm. on the Constitution, H. Comm. on the Judiciary). But, no one followed up on her point. *See id.* at 36.

> much is it going to cost the Federal Government if the definition of "spouse" is changed? It is not a matter of irrelevancy at all. It is not a matter of attacking anyone's personal beliefs or personal activity. That is not my purpose here. What is the added cost in Medicare and Medicaid benefits if a new meaning is suddenly given to these terms? I know I do not have any reliable estimates of what such a change would mean, but then, I do not know of anyone who does. That is the point—nobody knows for sure. I do not think, though, that it is inconceivable that the costs associated with such a change could amount to hundreds of millions of dollars, if not billions—if not billions—of Federal taxpayer dollars.[64]

Before tax legislation is passed, the Congressional Budget Office is usually asked to estimate the benefit or cost of any proposed changes. However, there was no request for such an estimate when DOMA was debated. As Senator Byrd noted in his testimony, there are over 800 references to marriage in federal statutes and regulations and over 3100 references to spouses.[65] In every case, these references are to persons who are legally married under state law and thus subject to state-imposed obligations regarding support and property ownership. Just as it was unknown whether including same-sex spouses would impose a cost on the federal government, it was also unknown whether failure to include same-sex spouses would impose a cost on the federal government. In other words, despite the fact that preservation of government resources was listed as one of the four justifications for passage of DOMA, no one attempted to estimate whether passage would in fact preserve government resources.

### *C. The Argument*

#### 1. Justifications for DOMA

There are four identified justifications for DOMA.[66] One of those justifications, protection of state sovereignty, seems unrelated to section 3 since that provision actually rejects state recognition of same-sex marriages. Representative Barney Frank, in an attempt to underscore the fact that the supporters of DOMA were not really concerned about state sovereignty or about protecting the federal government from activist judges, proposed an amendment to section 3 that would have made it inapplicable to same-sex marriages in states that elected to recognize such marriages

64. 142 CONG. REC. 22, 448 (1996).
65. *Id.*
66. *See supra* note 47 and accompanying text.

through the democratic legislative process.[67] The amendment was defeated, making it clear that the intent of DOMA was to reject same-sex marriages even when a duly elected and representative state legislature might approve of such marriages.

Of the three remaining justifications, two focus on related concerns about tradition: the protection of traditional marriage and the protection of traditional notions of morality.[68] So long as *Bowers v. Hardwick*[69] was on the books, protecting tradition and morality were permissible governmental objectives and could be used to justify discrimination against gay people. However, after *Lawrence v. Texas*,[70] decided in 2003, it is questionable whether or not public morality is a sufficient justification for such discrimination. *Lawrence*, of course, was primarily a due process case and so might be distinguished on that basis. But it was also argued and briefed as a case about discrimination against gay people.[71] And, even if concern about public morality is a legitimate governmental objective, it is questionable whether moral disapproval is sufficient on its own to justify the passage of DOMA.[72]

Protecting traditional marriage seems no different from protecting public morality. Marriage is a public institution and maintaining it as a union between one man and one woman is in keeping with tradition. Nonetheless, it is difficult to understand how keeping a public institution the same as it has been in the past is a sufficient justification for congressional action. There is, of course, the notion that marriage was in need of protection, but none of the DOMA supporters ever articulated how traditional marriage was protected by keeping same-sex couples out of the institution. Several amendments were offered during the congressional debates on DOMA that would have strengthened marriage. Representative Schroeder offered two such amendments: (1) an amendment requiring marriages to be monogamous; and (2) an amendment to restrict the federal definition of

67. *See* HOUSE REPORT, *supra* note 33, at 43.

68. *See supra* note 47 and accompanying text.

69. 478 U.S. 186 (1986).

70. 539 U.S. 558 (2003).

71. *See especially* Brief for Amici Curiae Professors of History in Support of Petitioners, Lawrence v. Texas, 539 U.S. 558. The Court also acknowledges a connection between due process and equal protection when the statute at issue creates stigma. *See* 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects ...").

72. *See* Mark P. Strasser, *"Defending" Marriage in Light of the* Moreno-Cleburne-Lawrence *Jurisprudence: Why DOMA cannot Pass Muster After* Lawrence, 38 CREIGHTON L. REV. 421 at 437–38 (2005).

marriage to exclude those who married after a no-fault divorce.[73] In her view, infidelity and easy exits from marriage were more harmful to the traditional institution than admitting committed same-sex couples into the institution would be. Neither amendment passed. The supporters admitted that their bill was a limited protection.[74]

Nor is it clear that protecting traditional marriage is a value in and of itself. Marriage has changed quite a bit over time. It is no longer the institution in which women lost their separate legal identity and were unable to own property.[75] A husband is no longer the lord and master of the marital unit.[76] Interracial marriages, once banned by state law, are now celebrated in every state.[77] Marriages are much more easily dissolved than they used to be and common law marriage, once widely recognized, has been retained by only a handful of states. One might say that in our collective wisdom we have been chipping away at traditional marriage for the past 200 years in favor of greater goods such as equality and freedom.

If tradition for tradition's sake is not sufficient justification for the passage of DOMA, that leaves the fourth justification: conservation of federal resources.[78] Whether conservation of federal resources is a sufficient justification depends on the level of scrutiny accorded discrimination against same-sex couples. If the discrimination is on the basis of gender, as the Supreme Court of Hawaii held,[79] then the justification is likely insufficient. Conservation of resources can never be a justification for discrimination against a suspect or quasi-suspect classification.[80]

### 2. Level of Scrutiny for an Equal Protection Challenge Under the Fifth Amendment

Statutes that classify on the basis of sex are generally subject to

73. HOUSE REPORT, *supra* note 33, at 44.

74. *Id.*

75. *See generally* NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985).

76. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455, 458, 461 (1981) (holding that Louisiana law authorizing the husband as "head and master" of the spouses' community property violated the Equal Protection Clause of the Fourteenth Amendment).

77. *Loving v. Virginia* struck down state laws prohibiting interracial marriages. 388 U.S. 1, 12 (1967).

78. *See supra* note 47 and accompanying text.

79. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

80. *See* Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (plurality opinion) (holding that achieving administrative convenience did not justify differential treatment among members of the uniformed services).

heightened or intermediate level scrutiny in federal courts.[81] A statute that treats couples differently depending on the gender of the two parties contains an explicit classification on the basis of sex. It is difficult to think of comparable government restrictions on the gender make-up of couples. Certainly if the government restricted an individual's friendships or coworkers to members of the same or opposite sex, such action would be reviewed under heightened scrutiny. Outside of marriage, can the government ever restrict certain couples to members of one gender or require opposite genders? Consider a possible governmental-run national ballet troupe. In ballet performances male-female pairs are often the norm. Closer scrutiny might, however, require analysis of attributes such as individual physical strength and size rather than gender. The point remains that denial of a position on a ballet team because of gender should trigger closer scrutiny. It can be argued that the same should be true of a governmental rule that governs who an individual may choose for a spouse.

Nonetheless, most courts that have considered the question of same-sex marriage and analyzed the nature of the discrimination embedded in rules that refuse to recognize such marriages do not find a gender-based classification. Rather, they find that marriage statutes discriminate on the basis of sexual orientation. And while at least three state supreme courts have found that discrimination on the basis of sexual orientation is entitled to the same high-level scrutiny as discrimination on the basis of race and sex,[82] no federal court has agreed with that analysis.[83]

It is unclear what level of scrutiny should be applied to test the constitutionality of DOMA. *Romer*, the only Supreme Court decision applying equal protection analysis to strike down an instance of sexual orientation discrimination, is not particularly helpful because it is unclear what level of scrutiny the Court applied. While the *Romer* Court claimed that the Colorado amendment could not survive rational basis review,[84] many commentators believe the Court was in fact applying a slightly higher standard than traditional rational basis review.[85] Some have called this review a more

81. Craig v. Boren, 429 U.S. 190 (1976).

82. *See In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 432 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

83. For a short time, the United States Court of Appeals for the Ninth Circuit was on record as giving heightened scrutiny to classifications based on sexual orientation. *See* Watkins v. U.S. Army, 847 F.2d 1329, 1349 (9th Cir. 1988). However, that decision by a three judge panel was quickly withdrawn by an en banc panel on rehearing. *See* Watkins v. U.S. Army, 875 F.2d 699, 711 (9th Cir. 1989) (en banc).

84. 517 U.S. 620, 631–32 (1996).

85. *See, e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on*

exacting form of rational basis review and at least one circuit court of appeals has suggested that *Romer* may "represent the embryonic stage[]" of a major change in doctrine.[86]

At the very least, *Romer* established the principle that in cases that discriminate against gay and lesbian people, and even applying the "most deferential of standards, [the Court will] insist on knowing the relationship between the classification adopted and the object to be attained."[87] One of the objects put forward by the state in *Romer* was the conservation of resources. Yet, the Court struck down amendment 2 concluding that the "breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them."[88] A similar argument can be made in *Gill*, i.e., that the wholesale disregard of same-sex marriages in tax law, without any review of actual costs, makes the conservation of resources argument suspect.

The effect of *Lawrence v. Texas*[89] on equal protection analysis is another factor. While the Court of Appeals for the Ninth Circuit has read the holding in *Lawrence* as limited to due process issues rather than equal protection issues,[90] the fact that *Lawrence* overruled *Bowers v. Hardwick* at the very least means that protecting public morality is an insufficient justification for governmental action that discriminates against gay men and lesbians. It is also possible that government regulation of marriage interferes with a sufficiently strong liberty interest to require something more than traditional rational basis review.[91]

For my purposes, however, whether DOMA should be scrutinized under a more exacting level of scrutiny than traditional rational basis scrutiny is irrelevant. By limiting the question to whether DOMA as applied to tax law is constitutional, traditional rational basis review is all that is necessary. I make a distinction here between traditional rational basis review and the somewhat greater deference that is often given to tax statutes. Since

*Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2191 (2002); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 231–33 (2002).

86. Powers v. Harris, 379 F.3d 1208, 1224 (10th Cir.2004).

87. *Romer*, 517 U.S. at 1627.

88. *Id.* at 1629.

89. 539 U.S. 558 (2003).

90. *See* Witt v. Dep't of the Air Force, 527 F.3d 806, 821 (9th Cir. 2008).

91. It has been consistently held in tax cases, however, that merely increasing a tax burden on the basis of marital status is not a sufficient burden on the right to marry to trigger a higher level of scrutiny. *See, e.g.*, Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978). Nor has any federal court held that marriage between partners of the same sex is entitled to any level of constitutional protection.

some scholars have argued that this greater "tax deference" might apply to DOMA,[92] "super-deferential" rational basis review that is sometimes applied to tax statutes. I will address the question of "super-deferential" rational basis in Part II of the article, which focuses on tax litigation issues. Here, my only claim is that under traditional rational basis review, DOMA flunks the rationality test. This is true because the refusal to recognize same-sex married couples as married for tax purposes is simply irrational.

### 3. Rational Basis Analysis

Of the four articulated justifications for DOMA, the only plausible justification for applying DOMA to the Internal Revenue Code is that it is intended to conserve governmental resources by not extending tax benefits to same-sex married couples.[93] Alternatively, one might phrase the justification as providing tax benefits for opposite-sex married couples, but not for same-sex married couples, in order to encourage desirable social policy (i.e., more opposite sex marriages).

The primary objective of tax provisions is to raise revenue. However, the Internal Revenue Code is replete with provisions that are intended to encourage certain economic or social behavior.[94] Thus, applying DOMA to the Internal Revenue Code might be justified it if helped to raise revenue or if it served as an incentive for opposite-sex couples to marry.

In 1997, the GAO identified 179 Internal Revenue Code provisions in which marital status was relevant,[95] but it made no budgetary estimate regarding possible gains or losses that might result as a consequence of DOMA's application to those provisions. In June of 2004, the Congressional Budget Office (CBO) did calculate the estimated effect on the federal budget if same-sex marriages were in fact recognized.[96] The CBO's

92. *See, e.g.*, Stephen T. Black, *Same-Sex Marriage and Taxes*, 22 B.Y.U. J. PUB. L. 327, 355 (2008) (stressing the "unique position of tax law with respect to judicial deference.").

93. *See supra* note 47 and accompanying text.

94. For example, the Internal Revenue Code deduction for home mortgage interest, I.R.C. § 163(h)(3)(E)(i) (2006), is generally justified as an indirect subsidy for home ownership and, thus, a benefit to those in the home building industry; we often refer to such tax provisions as tax expenditures and think of them as governmental subsidies. *See generally* STANLEY S. SURREY, *The United States Income Tax System—The Need for a Full Accounting, in* TAX POLICY AND TAX REFORM: 1961–1969: SELECTED SPEECHES AND TESTIMONY OF STANLEY S. SURREY 575 (William F. Hellmuth & Oliver Oldman eds., 1973).

95. *See* Letter from Barry R. Bedrick, Assoc. Gen. Counsel, Gen. Accounting Office, to Henry J. Hyde, Chairman, Comm. on the Judiciary, House of Representatives 7 (Jan. 31, 1997), *available at* 1997 WL 67783.

96. Letter from Douglas Holtz-Eakin, Dir., Cong. Budget Office, to Steve Chabot, Chairman, Subcomm. on the Constitution, Comm. on the Judiciary, U.S. House of Representatives (June 21, 2004) (attaching CONG. BUDGET OFFICE, THE POTENTIAL IMPACT OF RECOGNIZING SAME-SEX MARRIAGES

analysis of the tax consequences appears to focus primarily on the marriage tax penalty that results from the rate structure that is applied to the joint returns of married couples as compared with single or Head of Household rates. The report concluded that income tax revenues would increase if same-sex marriages were recognized by the federal government.[97] The report further concluded that, even though recognition of marriages would make the marital deduction available for same-sex married couples, the net effect on revenues from estate and gift taxes would be negligible.[98] Thus, the only governmental cost/benefit analysis of recognizing same-sex marriages concludes that to do so would likely create a bottom line fiscal benefit at the federal level.[99]

Nor is it possible to claim with any conviction that restricting marriage to opposite-sex couples for purposes of tax law is necessary to encourage opposite-sex couples to marry. Tax law has not been developed to *benefit* married couples. Instead, the current statutory scheme has been developed over decades of trial and error in an attempt to measure the correct tax base for each taxpayer.[100] To measure this correctly, the relationships between spouses must be reflected in the Internal Revenue Code. For example, we would not want to treat sales of property between spouses the same as sales of property between unrelated individuals. When two people are part of a single economic unit as they are in marriage, sales between them do not reflect the same economic substance as they do in transactions that occur in an open market. The Internal Revenue Code recognizes the spousal economic unit by denying the recognition of losses or gains on property transfers between spouses.[101]

(2004)), *available at* http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf.

97. *Id.* at 3.

98. *Id.* at 4.

99. *Id.* at 1. There are many problems with the CBO report. First, there is no sound data on the number of same-sex couples that would be likely to marry, and the report is based on an assumption that all 50 states would recognize same-sex marriage, thereby making all such marriages qualify at the federal level if DOMA was repealed. *See id.* at 1, 4. The report is based on data collected by the Census Bureau which, only since 2000, has asked questions that allow same-sex couples to identify as something other than roommates. *See id.* It is likely that the reported number is smaller than reality. The study also assumes only 50% of these couples will marry and that after they marry, they will not significantly change their allocations of earned income. More same-sex couples are part of a two earner household than opposite sex couples, for example. Another problem with the estimates is that there is no way to determine the amount of the current lost tax revenue that results from the Internal Revenue Code's current view of same-sex spouses as legal strangers. As a result, same-sex couples are currently able to organize their affairs to reduce overall tax liability in ways that opposite-sex couples cannot. *See generally* Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008).

100. *See generally* Cain, *supra* note 20.

101. *See* I.R.C. §§ 267(a)(1), 1041(a) (2006).

Several scholars have addressed the question of whether DOMA makes sense as a matter of tax policy. Professor William Kratzke argues convincingly that "DOMA is bad income tax policy."[102] While he stops short of arguing that DOMA is unconstitutional, his analysis reveals the irrationality of failing to treat same-sex married couples as married for income tax purposes.[103] One example should suffice to make the point. Section 23 of the Internal Revenue Code creates an adoption tax credit for taxpayers who adopt.[104] In essence, the federal government actually pays for the first $10,000 of adoption expenses for any taxpayer whose "adjusted gross income" (AGI) does not exceed $150,000. The credit is not available for any expenses incurred in the adoption of the child of the taxpayer's spouse.[105] Because same-sex partners are treated as single taxpayers, they can deduct up to $10,000 each for the adoption of a child, whereas a married couple would be limited to $10,000 between them.[106] Thus, if adoption costs for a same-sex couple totaled $20,000 and each partner's income was below $150,000, they would be entitled to a total tax credit of $20,000 between them. A married couple in such a situation would be entitled to a maximum credit of $10,000 and, if their combined income exceeded $190,000, they would be entitled to no credit whatsoever.[107] In addition, a spouse who incurs expenses for a stepparent adoption of his or her spouse's child is entitled to no credit at all. A same-sex spouse who similarly engages in a stepparent adoption under local law is entitled to claim the credit. It seems unlikely that Congress intended this perverse result, one that privileges same-sex adopting couples over married heterosexual adopting couples.

Professor Theodore Seto has similarly argued that DOMA is unwise because it treats same-sex committed couples as legal strangers, thereby enabling them to engage in tax-reducing transactions because, as strangers, they are not covered by the various anti-abuse rules that apply to related taxpayers.[108] For example, one partner can sell appreciated property to the other on the installment method and defer recognition of gain until the pur-

102. Kratzke, *supra* note 21, at 399.

103. *See id.* at 404–05.

104. *See* I.R.C. § 23(a)(1).

105. *See id.* § 23(d)(1)(C).

106. *See id.* § 23(b). The $10,000 amount is stated in the Internal Revenue Code provision, but it is adjusted annually for inflation. *See id.* § 23(b), (h).

107. *See* § 23(b)(2)(A). The amount of the credit begins to phase out at incomes above $150,000; the credit phases out completely when AGI reaches $190,000. *See id.*

108. *See generally* Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008).

chasing partner makes payments on the installment notes. The benefit that is not available to related parties is that the purchasing partner can then turn around and immediately sell the asset for cash without triggering any gain to the family unit. The purchasing partner has a step-up in basis, reflecting the purchase price, so that there is no gain on the sale to a third party, and the original selling partner will not recognize gain even though the cash is in fact available to the family unit. For related parties, § 453(e) provides that, upon the second sale to a third party, any cash received will be treated as though it was received by the original seller, thereby triggering gain upon the sale to the third party.[109]

At least one scholar, Professor Stephen Black, has argued that a law that distinguishes between same-sex and opposite-sex married couples for tax purposes is constitutional.[110] His argument rests on the assumption that the tax law provides benefits to married couples, especially those with children.[111] I disagree with his conclusions for several reasons. First, the tax code does not necessarily benefit all or even most married couples. In addition to the examples outlined above, consider the following:

1. In order to recognize tax losses, spouses must sell the property to a third party, whereas same-sex couples can transfer the property from one partner to another and recognize the loss.[112]
2. A married couple is limited to mortgage interest deductions on $1 million of acquisition indebtedness and $100,000 of home equity debt. By contrast, a same-sex couple can deduct interest on twice these amounts.[113]
3. An accrual-basis partner can deduct a liability for amounts to be paid to her partner (provided they are otherwise deductible) in the year the liability accrues, even though the

109. I.R.C. § 453(e)(1). Spouses are additionally prevented from this scheme because sales between spouses do not trigger gain and, thus, the purchasing spouse is not entitled to a step-up in basis. *See id.* § 1041.

110. Stephen T. Black, *Same-Sex Marriage and Taxes*, 22 BYU J. PUB. L. 327, 329 (2008).

111. *Id.* at 341.

112. *See* I.R.C. § 1041. Seto calls this the ability to recognize artificial losses. *See* Seto, *supra* note 99, at 1552.

113. *See* I.R.C. §§ 163(h)(3)(B)(ii) (E). But note that the IRS has recently issued a Chief Counsel Advisory claiming that unmarried couples who co-own a residence with more than $1 million in acquisition indebtedness are similarly limited to interest deductions on the $1 million amount, applying the limitation on a per residence rather than per taxpayer basis. *See* CCA 200911007 at 2009 WL 641772. While I disagree with this conclusion, *see* Patricia A. Cain, *Unmarried Couples and the Mortgage Interest Deduction*, 123 TAX NOTES 473 (2009), even if the IRS is correct on this point, the statutory rules nonetheless privilege unmarried couples who can claim interest on $2 million of acquisition indebtedness provided it is secured by more than one residence.

cash-basis partner does not report income until the payment is made in cash.[114]

4. Income phase-out limits that reduce certain itemized deductions are generally higher for two single taxpayers (e.g., a same-sex couple) than they are for spouses.[115]
5. While it is difficult to measure accurately the extent of the marriage tax penalty, it has been reported in various studies that approximately half of married couples pay the penalty.[116]
6. Debt discharge income occurs whenever a taxpayer or the taxpayer's spouse settles a debt for less than face amount. But if a same-sex partner is able to purchase his or her partner's debt from a third party at less than face value, there is no debt discharge income.[117]
7. Constructive ownership of stock rules under Subchapter C can prevent a spouse from redeeming stock at capital gains rates whenever the other spouse owns sufficient stock in the same company. Same-sex spouses or partners, however, are not covered by the constructive ownership rules because they are not related.[118]
8. The maximum standard deduction for a married couple, whether they file jointly or separately, is $6000. For a same-sex couple, it is the same. But, for a same-sex couple with at least one child, the combined standard deduction (one single taxpayer and one Head of Household taxpayer) is $7400.[119]
9. Married couples, whether filing jointly or separately, must either claim the standard deduction or itemize. That is, they cannot choose for one spouse to claim the standard deduction and for the other spouse to itemize, even when that would produce a greater tax benefit. Same-sex couples are

114. *See* I.R.C. § 267(a)(2).

115. *See* I.R.C. § 68(b).

116. The exact percentage is hard to identify and may well depend on what focus a particular study takes. For example, a 1997 Congressional Budget Office report focused on what married couples would pay if they were not married, and found that approximately 42% pay a penalty for being married. U.S. CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX xiv (1997), *available at* http://www.cbo.gov/ftpdocs/0xx/doc7/marriage.pdf [hereinafter CBO REPORT]. A report published by the Urban Institute in 2003, by contrast, focused on whether unmarried cohabitants would be better off if they married, and found that over 50% would pay a marriage penalty. GREGORY ACS & ELAINE MAAG, URBAN INST., IRRECONCILABLE DIFFERENCES? THE CONFLICT BETWEEN MARRIAGE PROMOTION INITIATIVES FOR COHABITING COUPLES WITH CHILDREN AND MARRIAGE PENALTIES IN TAX AND TRANSFER PROGRAMS 3 (2005), *available at* http://www.urban.org/ UploadedPDF/311162_B-66.pdf.

117. *See* I.R.C. § 108(e)(4)(A); Seto, *supra* note 99, at 1551.

118. *See* I.R.C. §§ 302(c)(1), 318(a)(1)(A), (a)(5)(B).

119. *See* I.R.C. § 63(c)(2).

not limited by this rule.[120]

10. Married couples must net their capital gains and losses. Thus, if one spouse has a $3000 long term gain (normally taxed at 15%) and the other spouse has a $3000 capital loss (otherwise deductible against ordinary income taxed at a higher rate than 15%), the couple will lose the benefit of the $3000 ordinary loss. Same-sex couples are not subject to this limitation since they file individual returns as singe taxpayers.

The other reason I disagree with Professor Black is because I do not believe the tax code was ever *intended* as an instrument to benefit married couples. It is instead a carefully designed system that balances the need to consider spouses as a single economic unit with the need to respect them as separate individuals. As I have argued elsewhere, the notion that Congress intentionally structured the tax code to benefit married couples is a myth.[121] The joint return was not created to benefit married couples, but rather to reduce geographical differences between spouses in community property states and non-community property states.[122] Section 1041 was adopted for exactly the same reason.[123] As a consequence, the argument that DOMA was enacted to benefit opposite-sex married couples and to conserve resources by not extending those benefits to same-sex couples is simply not consistent with the facts.

While I believe the four rationales for DOMA articulated in the legislative history are insufficient, in applying traditional rational basis review, courts are not constrained to consider only the articulated justifications in determining the constitutionality of a statute. Thus, if there is any plausible justification, a court can uphold the statute under rational basis review.[124]

In my view, the most plausible justification for enacting DOMA in 1996, as applied to tax law, was that the consequences of extending tax rules to same-sex couples were simply unknown at that time.[125] Same-sex

120. *See* I.R.C. § 63(c)(6).

121. *See* Cain, *supra* note 20, at 806.

122. *Id.* at 817.

123. *See id.* at 824 (noting that property divisions in community property states were generally not taxable events, whereas property divisions in non-community property states were typically taxable under *United States v. Davis*, 370 U.S. 65, 70 (1962)).

124. *See* Bruinooge v. United States, 550 F.2d 624, 626–27 (Ct. Cl. 1977) (upholding a tax statute that distinguished between enlisted men and certain types of officers in the taxation of combat pay despite any evidence of a rational basis in the legislative history; the court was willing to consider any possible rational justification).

125. Justice Martha Sosman made a similar argument in her dissent in *Goodridge*. "[I]t is rational for the Legislature to postpone any redefinition of marriage that would include same-sex couples until

marriage was admittedly a new concept at that time, as it did not exist in a single state. Congress might legitimately have wanted to study the question before determining whether tax treatment should be the same or different.[126] For example, no one knew in 1996 how other states might treat a same-sex marriage from Hawaii. And tax law has always depended primarily on state law for determining marital status.[127] The general rule is that a taxpayer is married for tax purposes if his or her domicile recognizes the marriage.[128] If thousands of same-sex couples had flocked to Hawaii to marry and then had returned to their home states, it might have been years before any clear law on the recognition of those marriages would have been developed. In the meantime, the Internal Revenue Service would have been faced with the burden of determining whether these thousands of couples were married for federal tax purposes. This sort of concern sounds legitimate, strong enough to withstand a rational basis inquiry.

It should not matter that this was not actually the reason that Congress passed DOMA. However, if this manufactured reason is merely a cover for animus, the reason might still be insufficient under rational basis and *Romer*. The primary problem with this justification is that it is a justification for delayed recognition and not for a continuing ban. To make sense as a rational justification, we should see some evidence of Congressional study of same-sex marriages.

such time as it is certain that that redefinition will not have unintended and undesirable social consequences." 798 N.E.2d at 982.

126. At the U.C.L.A. workshop, Ed Kleinbard suggested that a possible justification for DOMA might have been a concern about uniformity, i.e., Congress could have wanted to treat all same-sex couples the same despite the differences in state law that were bound to develop. My initial reaction was that it was still irrational to treat married same-sex couples as though they were unmarried even if uniformity sounded like a plausible goal. Upon reflection, I think Kleinbard's uniformity justification is best explained in the way I develop it in this paragraph. I thank him for nudging me toward this argument.

127. *See, e.g.*, Boyer v. Commissioner, 732 F.2d 191 (D.C. Cir. 1984) (applying Massachusetts law to determine whether taxpayer was single or married); McCarty v. U.S., 2004 WL 325603 (D.N.J. 2004) (taxpayers claimed Fiji marriage was not real, but IRS determined it was real under New Jersey law); Untermann v. C.I.R., 38 T.C. 93 (1962) ( applying New Jersey law to determine validity of marriage). *But see* Eccles v. C.I.R., 19 T.C. 1049 (1953), *non acq.* 1953-2 C.B. 8 and Rev. Rul. 55-178, 1955-1 C.B. 322. The Tax Court held the taxpayer was married for purposes of joint filing because he was married under Utah law. The Commissioner disagreed because the Service position was that taxpayers who were legally separated under an interlocutory decree were not married. Ultimately the Commissioner's non-acquiescence was withdrawn, 1957-2 C.B. 3, but the example stands as one in which the Internal Revenue Service did not view itself as bound by state law on marriage.

128. *See* Untermann v. C.I.R, 38 T.C. 93 (1962). *But see* Boyter v. Commissioner, 668 F.2d 1382 (4th Cir. 1981), involving an opposite sex couple that divorced just before December 31 in Haiti and then remarried in Maryland early in January. The state law issue was whether or not Maryland recognized the Haitian divorce. If it didn't then the couple would have remained married on December 31. However, the Court of Appeals also suggested that it might simply be able to ignore the divorce under the sham transaction doctrine, regardless of the technicalities of state law.

Thirteen years have passed since DOMA was enacted. During that time practically every state has enacted a state level version of DOMA. By April of 2009, we knew that four states recognized same-sex marriage,[129] 42 states banned same-sex marriage, either by statute or by constitutional amendment, and in some cases by both statute and amendment,[130] and four states were "free states" with no statutory ban.[131] Of the four "free states," New York has ruled in favor of recognizing foreign same-sex marriages,[132] New Jersey has ruled against recognition,[133] Rhode Island has ruled against recognition,[134] and New Mexico has yet to speak.

Surely the reason for treating married couples differently from legal strangers is that they are, in reality, not separate individuals with unrelated or unshared financial aims. They share a commitment that the state recognizes and enforces. Obligations of support generally cannot be contracted away and property rights vest under state law depending on a couple's marital status. While couples may agree in advance to keep their property separate after marriage, and, in some cases, may waive alimony obligations post-divorce, these contracts are scrutinized closely and, in most states, can never affect current or temporary support obligations.[135] When two people, together with the force of state law, become a single economic unit, it is irrational to treat them as strangers solely on the basis of the gender of the two spouses.

The law is now fairly well settled. In every state, except perhaps New Mexico,[136] we know how the marital status of same-sex couples will be treated and therefore can be fairly certain whether the state will impose marital obligations or otherwise treat the couple as a signle economic unit. If the rational justification for enacting DOMA was to ensure that only same-sex marriages with enforceable legal obligations under state law

129. Massachusetts, Connecticut, Iowa and Vermont.

130. *See* Christine Vestal, *Same Sex Marriage Legal in Four States*, STATELINE.ORG, June 4, 2009, http://www.stateline.org/live/details/story?contentId=347390.

131. New York, New Jersey, Rhode Island, and New Mexico.

132. *See* Godfrey v. Spano, 871 N.Y.S.2d 296 (App. Div. 2008) (involving executive order from Westchester County) and Lewis v. New York State Dep't of Civil Serv., 872 N.Y.S.2d 578 (App. Div. 2009). The New York Court of Appeals has agreed to hear appeals in these two cases.

133. Quarto v. Adams, 929 A.2d 1111 (N.J. 2007) (refusing to recognize a Canadian same-sex marriage for purposes of state income tax laws regarding joint returns).

134. Chambers v. Ormiston, 935 A.2d 956 (R.I. 1962). The exact holding in this case was that the Family Court did not have jurisdiction to grant a divorce to a same-sex couple married in Massachusetts. That holding does not necessarily mean that foreign same-sex marriages will not be recognized in Rhode Island for other purposes.

135. *See generally*, Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIM. LAW. 413 (2008).

136. And perhaps also Rhode Island. *See* supra note 134.

would be recognized for tax purposes, then that rationale is based on an assumption that whenever enforceable marital legal obligations exist, marriage recognition at the federal level is desirable. At this point in time, therefore, failure to recognize legally binding state-recognized same sex marriages once again becomes irrational.[137]

## II. TAX LITIGATION

Despite my deep conviction that DOMA, as applied to tax law, is unconstitutional because it is not rational, I am hard pressed to determine how one might raise this constitutional challenge successfully in tax litigation. A taxpayer cannot simply go into federal court and ask for a declaratory judgment that the Internal Revenue Code must be construed to treat opposite-sex and same-sex spouses the same.[138] A tax issue must be presented as a real case or controversy of a real taxpayer.[139]

There are two ways to litigate tax issues. If a taxpayer has underpaid his taxes and the IRS challenges that underpayment by assessing a deficiency, then the taxpayer can challenge the IRS in tax court.[140] Alternatively, a taxpayer may overpay taxes and then seek a claim for refund from the IRS. Once the IRS denies that claim (or fails to respond to the claim after a six month period), the taxpayer can sue the government for the refund in district court.[141]

137. Changes in society can cause a once constitutional law to become unconstitutional. Consider, for example, Justice O'Connor's opinion in *Grutter* suggesting that race-based admissions might be constitutional in the short run, but not necessarily in the long run. *See* Grutter v. Bollinger, 539 U.S. 306 at 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary.").

138. Section 7421(a) of the Internal Revenue Code provides: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." This provision is known as the tax anti-injunction act. The Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes* . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . . .

28 U.S.C. § 2201(a) (2006) (emphasis added).

139. Standing to challenge a specific provision can become an issue in constitutional attacks on tax statutes because the taxpayer must be harmed by the statute's provision. *See, e.g.*, Johnson v. United States, 422 F. Supp. 958, 964 (N.D. Ind. 1976) (holding that a taxpayer does not have standing to challenge a tax statute if she "voluntarily disadvantaged herself solely for the purpose of making [a] constitutional challenge"). *But see* Lawrence Zelenak, *Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional?* 44 TAX L. REV. 563, 616–25 (1989) (discussing theories for extending standing in certain constitutional challenges).

140. *See* I.R.C. § 6213(a) (2006). Once a deficiency is assessed, the taxpayer is given a ninety-day letter advising the taxpayer of the right to petition the tax court for a redetermination of the deficiency. *Id.* The tax court has no jurisdiction to hear an appeal until a statutory notice of deficiency is issued. *Id.*

141. *See id.* §§ 6532(a)(1), 7422.

Thus, in order to bring the issue of DOMA and the Internal Revenue Code before a court of competent jurisdiction, the taxpayer will have to structure a claim for reduced taxes on the basis of marital status. The only taxpayers with standing to challenge DOMA are same-sex married couples.[142]

### *A. Standing*

The plaintiffs in *Gill* all have standing to challenge DOMA because they have all been denied a federal benefit. Furthermore, the tax plaintiffs in *Gill* have followed the necessary administrative procedures by filing an amended return, which was rejected by the Service. They are properly before the federal district court, asking for a refund of overpaid taxes, an overpayment based solely on the fact that DOMA prevents the Service from recognizing their marriage.

And yet I perceive a problem for the *Gill* tax plaintiffs as they argue that DOMA is irrational (and thus unconstitutional) as applied to them. Because the anti-injunction act and the declaratory judgment act provide protection for tax legislation against broad attack, courts considering challenges to tax law typically look only at the specific issue before them, the one that the taxpayers have standing to contest.[143] If the specific issue is whether a same-sex married couple should be allowed to file jointly, the judge may view the question as one about the overall effect of DOMA on the Code and not just its application to filing status for the couples before the court. Also, when married couples have claimed that the § 1 rates discriminate against them because of their marital status, judges have noted that tax laws are not consistently rational in their treatment of taxpayers and thus sometimes the rates in § 1 benefit married couples and sometimes they burden them.[144] The same is true for same-sex married couples chal-

142. Registered Domestic Partners in California tried to challenge DOMA, claiming that their spousal-like status should be recognized, but the United States Court of Appeals for the Ninth Circuit held that they had no standing since they were not actually married. *See* Smelt v. County of Orange, 447 F.3d 673, 683–84 (9th Cir. 2006).

143. *See, e.g.*, Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978). This was a challenge to the joint return rates as applied to a married couple who was subject to the marriage tax penalty caused by the rates when two spouses are both income earners. The taxpayers pointed out several other burdens caused by the Internal Revenue Code, such as the fact that married couples were limited to a smaller standard deduction than two single taxpayers would have been entitled to claim. The court refused to consider the challenges to any provisions other than the ones relevant to the taxpayers' claims. Since they had not claimed the standard deduction, they had no standing to argue that it was an additional provision that discriminated against married couples.

144. *Id.; see also* Johnson v. U.S. 422 F. Supp. 958 (D. Ind. 1976); Druker v. Commissioner, 697 F.2d 46 (2d Cir. 1982).

lenging § 1 rates, as applied to them. Sometimes being recognized as married is a benefit under the tax law and sometimes it is a detriment. The trick will be to get a court to look at the overall effect of DOMA on the tax code, i.e., beyond § 1 filing status, because it is from that perspective that DOMA appears irrational.

If a court can consider the overall effect of DOMA on tax law, then the court can consider all benefits and burdens and ask whether it makes sense to impose them on opposite-sex couples, but not on same-sex couples. In my view some of the strongest arguments against DOMA are those that focus on the benefits unmarried couples reap by being treated as strangers for tax law purposes. These "unmarried tax benefits" were described earlier in this article,[145] and include the ability to be treated as unrelated parties under a number of anti-abuse rules. It seems irrational to create benefits for same-sex couples if the primary justification for adopting DOMA was to benefit opposite-sex couples. And yet no same-sex couple would have standing to argue about the rationality of the "unmarried tax benefit" provisions because they suffer no harm from these provisions. Instead, it should be married couples who challenge DOMA as applied to these provisions. In effect, such couples would be arguing that it is unconstitutional to treat them as married just because they are heterosexual when other couples who are married, i.e., same sex couples, are treated as unmarried. This sort of case would make an interesting companion case for *Gill*.[146]

Another ideal challenge to DOMA, in my view, would be to attack the exclusion of same-sex married couples from the tax benefit accorded opposite-sex married couples when an employer of one spouse is willing to include the non-employee spouse in the company health plan.[147] A same-sex unmarried couple would have standing to challenge this provision as would an employer, who is required to pay payroll taxes on this imputed income. Indeed, the *Gill* case is likely to include a taxpayer who can make this claim as soon as the IRS rejects the claim and thereby gives taxpayer stand-

145. *See* text accompanying notes 112–120.

146. In such a case, the court would be faced with the question of remedy—literally the question would be whether to extend the benefits of DOMA to the married couple or to strike DOMA down as applied to similar transactions by same-sex married couples. I predict (without much sense of risk) that the remedy would be the striking down of DOMA, but worry whether it would only be struck down as applied to related party transactions, which of course would not create an overall benefit for same-sex married couples. Alternatively, a court might view the case as one in which the married couple is really pressing the constitutional claims of unmarried couples. That creates a different sort of problem, which ultimately goes to the question of standing. See Zelenak, *supra* note 139 for a discussion of this issue.

147. *See* I.R.C. § 105; *see also id.* § 106.

ing to sue in District Court.[148]

I would advise the taxpayer, whether it is the employee or the employer, to pay the tax and then file a claim for refund claiming that DOMA is unconstitutional as applied to §§ 105 and 106 of the Internal Revenue Code.[149] Presumably the claim would be denied, and then the taxpayer would file suit in federal district court. The amount in controversy would be fairly small but the issue would be clear: what is the justification for taxing health care benefits provided by an employer to a taxpayer's spouse, a spouse whom the employee is obligated to support under state law and who stands in the same position to the employee as the opposite-sex spouses of similarly situated employees who receive this benefit at no additional tax cost?

By focusing on the tax treatment of employer-provided health insurance, I would hope to highlight the conflict between DOMA, best justified as a policy to benefit opposite-sex couples, and Internal Revenue Code §§ 105 and 106, which implement a broader social and economic policy to provide health insurance to more working Americans and their families.[150] It is difficult to imagine a rational justification for taxing, and thereby discouraging, broader insurance coverage. The benefit to opposite-sex married couples is available whether or not the benefit is extended to same-sex married couples. And to deny the benefit to same-sex married couples appears to be based on a mere desire to harm them by making it more costly to obtain health insurance.

But even if my taxpayer were to succeed in her argument about the taxation of employer-provided health insurance under § 106, that success does not necessarily strike down DOMA's further application to the Internal Revenue Code. Is it possible to argue for a broader striking down of DOMA as applied to tax law generally? I can find no authority on this issue

148. *See supra* note 12. As this article was in press, the plaintiffs challenging income tax inclusion of the health plan benefits were added to the case. *See* http://www.glad.org/work/cases/gill-vs-office-of-personnel-management/.

149. Because DOMA clearly applies to prevent same-sex spouses from claiming that the employer-provided benefit is excluded from income, the taxpayer-employee should not file an original return excluding the income, even if she discloses the reason for the exclusion. Accuracy related penalties are imposed against taxpayers who intentionally (or negligently) disregard rules. *See id.* § 6662(b)(1). One might argue that a taxpayer who discloses the noncompliance by claiming a constitutional right is not in fact "disregarding" a rule, but instead is challenging the rule. However, at least one court has held otherwise. *See* Druker v. Comm'r, 697 F.2d 46, 51–56 (2d Cir. 1982) (upholding higher tax rates for a married couple against a constitutional claim and imposing accuracy related penalties where taxpayers filed using the rate schedule for single taxpayers and disclosed their reason for doing so). The safest course of action, therefore, would be to file according to the rule and to then file an amended return raising the constitutional objection.

150. *See* I.R.C. §§ 105–06.

and I have no reason to be confident that federal courts would be willing to rule more broadly in a tax case than on the specific issue before it. Such a broad ruling would be unprecedented in tax litigation. But then DOMA is an unprecedented statute. And, if it us understood as resulting from hotility and animosity toward gay people generally, then the only meaningful remedy would be to strike it down in full. A ruling that DOMA is unconstitutional whenever it is applied to tax rules would be the only way to remedy the stigmatic injury caused by DOMA. Nonetheless, the narrow requirements of taxpayer standing to challenge tax statutes remains a concern.

### *B. Deference to Tax Statutes*

Another difficulty with challenging DOMA in a tax case is that courts traditionally defer to legislative choices in matters of taxation.[151] In a review of over 150 tax cases claiming that a particular provision violated either principles of equality or due process, or both, I could find only one case in which the challenge was successful.[152] In all other cases, the distinctions drawn in the tax statutes were upheld as reasonable legislative choices in the administration of tax law. Professor Black cites this principle of deference in tax litigation as an additional reason why courts are likely to uphold the different treatment of same-sex and opposite-sex couples.[153]

Why do we give deference to tax statutes? Most tax cases and tax scholars cite to *Brushaber v. Union Pacific Railraod Company*[154] as primary authority for the principle that tax statutes should be accorded great deference.[155] The *Brushaber* Court recognized a potential conflict between the taxing power and the Fifth Amendment's due process and takings

151. *See, e.g.*, Lockmiller v. Comm'r, T.C. Summ. Op. 2003-108, 5–6 (2003) ("Tax legislation carries a 'presumption of constitutionality', Regan v. Taxation With Representation of Wash., 461 U.S. 540, 547 (1983), which presumption has been described as 'particularly strong', Nammack v. Comm', 56 T.C. 1379, 1385 (1971), *aff'd per curiam* 459 F.2d 1045 (2d Cir. 1972); *see* Black v. Comm'r, 69 T.C. 505, 507–08 (1977)."); *see also* Zelenak, *supra* note 139, at 567–88 (discussing equal protection challenges to tax legislation).

152. *See* Moritz v. Comm'r, 469 F.2d 466, 470 (10th Cir. 1972) (dealing with the dependent care deduction under I.R.C. § 214 as it existed in 1968, which provided for a deduction for an unmarried woman but not an unmarried man; the gender classification was subjected to a higher level scrutiny than mere rational basis). *But see* Mfrs. Hanover Trust Co. v. United States, 775 F.2d 459, 461–69 (2d Cir. 1985) (holding no unconstitutional gender discrimination in use of gender-based mortality tables used for valuing reversionary interests for estate tax purposes).

153. Black, *supra* note 110, at 355.

154. 240 U.S. 1 (1916).

155. *See especially* Bruinooge v. United States, 550 F.2d 624 (Ct. Cl. 1977) ("Because this case involves a constitutional challenge to a tax statute, the Government seems sometimes to urge us to apply a test even less demanding than the rational basis test.") (government cited to *Brushaber* for this test).

clauses. Addressing this apparent conflict, the Court continued, by explaining that it is

> [W]ell settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause.[156]

The court also concluded that the exercise of the taxing power would not result in an unconstitutional taking unless the exaction "was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to [that] conclusion."[157]

*Brushbaker*'s support for judicial deference in matters of taxation has been cited to ward off constitutional challenges to the progressive nature of federal income taxation,[158] the retroactive application of a new tax statute,[159] as well as unequal burdens imposed by the states through property taxes.[160] Some courts have gone so far as to say that "the power to tax may be exercised oppressively upon persons,"[161] and have explained that in such cases it is not up to the courts to strike down the statute, but rather the power to reverse the legislation lies with the people who have the right to vote their legislators out of office.[162]

To rely on the democratic process to remove a tax burden that has been imposed against an unpopular and relatively politically powerless group (e.g., same-sex married couples) seems an unreasonable justification for judicial deference when the claim is a violation of equal protection. Taxpayers have brought equal protection challenges and, as noted earlier, they have generally lost in court.[163] Yet, while courts sometime refer to *Brushaber*'s requirement for judicial deference to tax legislation, a careful reading of the cases shows that the court's application of rational basis analysis is no less exacting than in non-tax cases.

At least one court has specifically questioned whether tax legislation that discriminates against a class of persons should really be subject to a

156. *Brushaber*, 240 U.S. at 24.

157. *Id.* at 25.

158. *See, e.g.*, Swallow v. United States, 325 F.2d 97 (10th Cir. 1963).

159. *See, e.g.*, United States v. Darusmont, 449 U.S. 292 (1981).

160. *See* A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934); *See also* Nordlinger v. Hahn, 505 U.S. 1 (1992) (not citing *Brushaber*, but using its principle of deference to uphold California's Proposition 13 which taxes long-term homeowners at a much lower rate than recent purchasers).

161. *See Hamilton*, 292 U.S. at 45.

162. *Id. See also* Leo P. Martinez, *Tax Policy, Rational Actors, and Other Myths*, 40 LOY. U. CHI. L. J. 297 at 310 (2009).

163. *See supra* note 152 and accompanying text.

lower rational basis test than the test that applies to economic regulation generally.[164] *Brushaber*, after all did not address equal protection challenges to tax statutes. It was not until 1954, when the Supreme Court handed down its opinion in *Bolling v. Sharpe*,[165] that the requirement of equal protection was firmly established as part of the due process clause of the Fifth Amendment.

Thus, while some may argue that deference to tax legislation remains a great hurdle for taxpayers who wish to challenge DOMA as applied to a tax statute, I remain unconvinced. It is not clear that the deference should be any greater than the deference accorded Amendment Two in *Romer*. There the overbreadth of the provision belied its rational basis and instead suggested animus against a class as the true reason for its enactment.[166] DOMA is, after all unusual as a tax statute. It was not considered by the tax-writing committees and there was no report from the Secretary of the Treasury as there normally is with tax legislation before Congress. It has nothing to do with raising revenue. And, most important, it discriminates against a politically powerless group. Therefore, I do not believe it is entitled to special deference just because it can be characterized as a tax statute.[167]

Nonetheless, even a carefully constructed taxpayer challenge to DOMA may fail, not because DOMA is rational as applied to tax law, but only because of the inherent problems taxpayers face in challenging tax statutes. Even if they have standing to challenge a particular provision, the court may find that the provision is not discriminatory because it doesn't uniformly harm the class.[168] The strongest retort to this claim is that

164. *See* Bruinooge v. United States, where the court observed that it

> [I]s unclear whether such a test, if it is in fact more lenient than the traditional test, still exists. At least, we are unaware that it has ever been invoked, for the Supreme Court has sustained discriminations in federal tax statutes that have been constitutionally challenged upon finding that a sufficient rational basis existed.

550 F.2d 624, 626 (Ct. Cl. 1976).

165. 347 U.S. 497 (1954).

166. *See also* U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (a bare congressional desire to harm an unpopular group is not a legitimate purpose).

167. One might argue that DOMA is not a tax statute because of its placement in title 1, chapter 1 of the U.S. Code. Chapter 1 contains 8 rules of construction that apply to the U.S. Code as a whole, including the definition of person, vessel, and vehicle. These are general definitions and not tax statutes. However, when applied to a tax statute, I believe it is fair to characterize the provision as a tax statute. Whether or not it is subject to special deference as a tax statute is a separate question.

168. *See* Manufacturer's Hanover Trust Co. v. United States, 775 F.2d at 466 (gender classification was not invidious in part because the aggregate impact on the class was not necessarily harmful). The gender classification in this case, however, does not create stigma. That is, women are not disrespected simply because they live longer. By contrast, DOMA does produce stigma whether or not it harms a same-sex couple economically.

DOMA does in fact uniformly harm all same-sex couples because it stigmatizes them by refusing to honor the validity of their marriages. Stigma is a separate harm and is not dependent on economic harm.

Alternatively, a court may be unwilling to reach the question of stigma and might rely on the notion of "tax deference" to support such an outcome. Even though courts do not necessarily apply a weaker rational basis test for tax statutes, they do continue to cite to *Brushaber* for that principle. Whether or not the creation of stigmatic harm is sufficient to overcome the considerable greater deference accorded tax statutes would be an issue of first impression. Given these various difficulties, it could be up to Congress to bring rationality back to the Tax Code by repealing DOMA.

## III. A WORLD WITHOUT DOMA

Whether DOMA is struck down by courts or by Congress, a world without DOMA would necessarily raise new issues for tax law. These new issues would involve policy questions that range from who should be treated as married for tax purposes under the current Code structure to a total rethinking of the Code and whether marriage should ever be an appropriate classification for taxation. As tax policy questions, these issues would be best resolved by Congress rather than the courts. Nonetheless one can imagine new equal protections challenges, post-DOMA, brought by taxpayers in civil unions and registered domestic partnerships that mirror marriage under state law. A justification for distinguishing between marriage and California RDPs is not readily apparent. That is because the presumptive justification for treating married couples different from unmarried couples is, at least in part, because of the mutual legal obligations of support and property sharing rules imposed under state law.[169] If states apply the same rules to RDPs and parties to a civil union, then shouldn't tax law treat these couples the same as married couples?

### *A. Who Should Be Treated as Married Under the Tax Code?*

Although the rule is not clearly and completely stated in the Internal

169. In the past, courts have often cited the existence of these legal obligations for spouses as a justification for not treating unmarried cohabitants the same as spouses. *See, e.g.*, Phillips v Wisconsin Personnel Commission, 482 N.W.2d 121 (Wis. App. 1992) (upholding denial of health benefits to same-sex partner of employee because unmarried couples and married couples are not similarly situated).

Revenue Code, or in the regulations, it is generally assumed that for tax purposes, a couple will be considered as married if they are legally married in the state of domicile.[170] There are exceptions to this rule, but they are covered by specific provisions, such as those that cover alien non-resident spouses[171] and those that cover couples who are legally separated or are living apart.[172]

Since the enactment of joint returns in 1948, Congress has generally not had to consider whether the substantive marriage laws of all states are sufficiently similar to treat married couples from all states the same. But assume, solely for purposes of argument, that a state decides to allow two people to obtain a marriage license and become married without imposing any meaningful support or property obligations on the two spouses. Couples who want the traditional mutual support and property obligations can choose instead to enter into a civil union. And just to be fair, the state also allows a couple who wants both marriage and obligation to enter into both marriage and a civil union. If couples in such a state were solely motivated by federal tax rules, all couples who would experience a marriage tax bonus would marry. All couples who would experience a marriage tax penalty would enter into civil unions.[173]

Which of these couples should be treated as married for tax purposes? If the existence of mutual support and property obligations is the key justi-

170. I.R.C. § 7703 defines marital status for tax purposes, but all it does is provide the substantive rule that if spouses are married on the last day of the tax year, they are considered married for filing purposes. It also provides that if a spouse dies during the tax year, the surviving spouse shall be considered married and further that if the spouses are legally separated, they will not be considered married. The regulations do not enrich this definition. Thus neither the Code nor the regulations address such questions as (1) if there is a conflict of law problem, which state's law controls; or (2) how to determine the validity of a marriage or a divorce under state law. Rev. Rul. 67-442, 1967-2 C.B. 65, provides that the IRS will not question the validity of a divorce unless a court of competent jurisdiction declares a divorce invalid, thereby clearly indicating a deference to state law. Similarly, Rev. Rul. 58-66, 1958-1 C.B. 60, provides that the IRS will recognize common law marriages so long as the state in which the marriage was entered into recognizes it. It does not address the question of what happens when the couple moves to a new state. Rev. Rul 76-255, 1976-2 C.B. 40, provides that if a state court annuls a marriage then the IRS will treat the marriage as never having existed. Thus, the couple who filed joint returns would be expected to file an amended return as single taxpayers. However, this ruling also provides that when a couple enters into a foreign divorce at the end of the year, intending to remarry in January and does remarry, then whether or not the divorce is recognized, the couple will be considered married as of year's end under the sham transaction doctrine. This is the only instance I can find in which the IRS departed from its general reliance on state law for the determination of marital status.

171. *See* I.R.C. § 3402(l)(3)(a).

172. *See* I.R.C. § 21(e)(3) and (4).

173. This is already possible in some states. In California, for example, opposite sex couples over the age of sixty-two can choose between marriage and RDP status. The substance of both arrangements is virtually the same, but if marriage for federal purposes (taxes or social security) is bad for the couple, some will choose to become RDPs.

fication for taxing marrieds and unmarrieds differently, then we should focus on the existence of these obligations rather than nomenclature.

Furthermore, if mutual support and property obligations are central to the determination of marital status for tax purposes, then the next question should be whether those obligations must be *imposed* by the state or merely be *enforceable* by the state, as in the case of privately negotiated domestic partner agreements.[174] A realated question is whether opposite-sex spouses, who have waived all support obligations and marital property rights are a sufficient enough economic unit to warrant tax treatment as married. On one hand, substantive rights and obligations seem central. But on the other hand, privacy concerns might militate against IRS intrusion into the private sphere to examine private relationship contracts or pre-marital agreements. Legislative choices would need to balance these two interests (equal treatment and privacy) in order to provide the optimal solution.[175]

### *B. When is Marrage an Appropriate Classification for Tax Rules?*

When two people operate as a single economic unit, then it seems appropriate to ignore transactions between the two people for tax purposes. Thus, the anti-abuse rules, as well as § 1041, seem to use marriage appropriately as a basis for distinguishing between some couples and others. At the very least these rules should also be applied to civil unions and registered domestic partnerships that mirror marriage.

Some tax rules, however, should use even broader classifications. One good example of such a rule is the exclusion from income of employer-provided health insurance benefits. Many employers offer domestic partner benefits under their health plans. Determining which of these benefits are taxable to the employee and which are tax-exempt puts an unnecessary burden on employers. Employers provide these benefits in order to attract talented employees and to treat employees equally regardless of sexual orientation. Tax law should respect employers' decisions about who is entitled to this benefit. Any beneficiary eligible under an employer's plan should be entitled to the same tax-free benefit as any other beneficiary.

174. Some such agreements may not be enforceable under the laws of certain states. *See, e.g.*, Hewitt v. Hewitt, 394 N.E. 2d 1204 (Ill. 1979).

175. For example, Congress could require a default agreement of 50/50 income sharing and equal ownership of property acquired during the relationship before allowing two people to claim "marital status" for tax purposes. Taxpayers would agree to the default rules by reporting as married taxpayers. Would sham transactions arise? Probably yes, to the extent the rules could be manipulated for tax advantage. But failure to abide by the terms of such a contract could be penalized as tax fraud in order to discourage such behavior.

This approach would relieve Congress from trying to create a workable definition of "domestic partner" or "significant other." The employer's definition should be sufficient to avoid abuse of the tax exemption. Making such benefits exempt from income tax is consistent with a national policy to encourage employers to provide health insurance more broadly.[176]

Another example of a marriage sensitive rule that ought to be ripe for reconsideration is the marital deduction provision under the gift and estate tax rules. We have not always had a 100% marital deduction under the gift and estate taxes. When the taxes were first adopted there was no marital deduction at all. A 50% marital deduction was then introduced in 1948 to minimize tax differences between spouses in community property and non-community property states.[177] The 100% marital deduction was adopted in 1981.[178]

At the very least, this 100% marital deduction should be extended to partners in states that recognize the partners as spousal equivalents. In such cases, the support obligations and property ownership rules imposed upon a couple might clarify that they are viewed as a single economic unit. Alternatively long-term cohabitation and joint ownership of property might be the best indicator that two people expect to be able to liveout their lives enjoying the jointly-owned property. Two people who are responsible for each other's financial well-being should not be hit by a transfer tax when transfers are made between them. If they jointly acquire property that they intend to enjoy during their joint lives, the survivor should not have to pay a duty in order to continue enjoying those assets upon an untimely death of her partner.[179]

As before, if we limit the deduction to couples in recognition states, we have not solved the problem for couples in non-recognition states whose financial interdependence can be just as real, whether or not their relationship is officially recognized. Congress should therefore attempt to find some principled way to exempt lifetime and deathtime gratuitous transfers between committed partners from the transfer tax. To identify an appropriate principle, one has to question what the purposes of the gift and estate taxes are. Neither tax raises much revenue and thus we should look

176. A bill to this effect has been introduced in several recent sessions of Congress, but has never reached the floor. *See, e.g.*, Tax Equity for Health Plan Beneficiaries Act of 2007, H.R. 1820, 110th Cong. (2007).

177. Cain, *supra* note 20 at 821–22.

178. *See, e.g., id.* at 822.

179. For a more complete discussion of this point, see generally Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677 (2000).

to other purposes to determine when it is appropriate to levy the tax. The estate tax has been justified as necessary to break up concentrations of wealth and to provide some degree of progressivity as a back up to the income tax. While the gift tax was initially adopted to protect the estate tax, it has more recently been justified as necessary to prevent assignments of income from higher bracket taxpayers (e.g., parents) to lower bracket taxpayers (e.g., their children). With the advent of the 100% marital deduction, the transfer tax system applies primarily to wealth transfers to a lower generation. Taxing only wealth transfers to the lower generation would satisfy the primary purposes of both the estate and gift tax. Thus, it should be possible to reconceive both taxes as including a 100% deduction or exemption for transfers made between committed partners of the same generation.[180] Definitional problems are no small hurdle here. For example, who is a committed partner and what counts as the same generation? But these are not insurmountable problems, and a solution is necessary in order to create any degree of parity between same-sex and opposite-sex couples. This change, after all, should be the least controversial since, according to the government's own study,[181] the revenue loss would be negligible. That is because the transfer tax for married couples is merely deferred until the wealth passes to the next generation.[182] The same would be true for any committed couple whose partners are in the same generation.

In a world without DOMA, the good news is that Congress would at last be free to consider these significant policy issues regarding the appropriate tax unit and the role of marriage in tax law, uninhibited by the requirement that meaningful and real relationships be ignored for tax purposes. Furthermore, the state law remedies of creating civil unions, domestic partnerships, and reciprocal beneficiary status for certain unmarried couples has created even more interesting questions about what types of state-sanctioned relationships should count for federal tax rules.

In this Section, I have described several issues and possible solutions under a handful of Internal Revenue Code provisions for which marital status is key. My purpose has been to suggest the sorts of issues that are likely to arise once DOMA has either been struck down by a court or re-

180. A reconceived estate and gift tax might even go further and exempt all transfers other than those to a lower generation. Thus a daughter who supports her mother should not be treated as making taxable gifts and a brother who leaves the family estate to his sister should not be taxed on the transfer.

181. *See* CBO REPORT, *supra* note 96, at 3–4.

182. For same-sex couples with taxable wealth, a tax is levied at the death of the first partner, who typically leaves her wealth in a bypass trust to the survivor so that the wealth is only taxed at the death of the first partner.

pealed by Congress. Geographical differences in treatment of same-sex couples would remain, resulting in a serious lack of uniformity in the application of tax law principles. State laws do matter in federal tax law. While the federal government has limited power and thus cannot likely change state law regarding marital status, it should begin to reflect on those state law differences in the same way it did in the period between the decision in *Poe v. Seaborn*[183] and the creation of joint returns in 1948. A federal solution to the resulting lack of uniformity will be required. But it must be one that accounts for the differences in state law.

## CONCLUSION

In this article, I have argued that DOMA is not only unwise tax policy, it is also likely unconstitutional. Because of tax litigation rules, however, it may be impossible to challenge DOMA successfully in court.[184] As a result, it may be up to Congress to remedy the bad policy. Finally, it is necessary but not sufficient to merely repeal DOMA. All same-sex couples in committed relationships, whether state recognized or covered by private contracts, deserve congressional attention on the tax law front. The situation is complicated by the differences in state law, but Congress has dealt with such differences before in constructing tax policy.[185] The aim of tax policy, after all, is not to privilege one form of family over another, but to define accurately the correct tax base, according to ability to pay, of each individual taxpayer. Legislation cannot define that tax base accurately by ignoring the intimate and committed relationships of all taxpayers.

183. 282 U.S. 101 (1930).

184. The recently filed case, *Gill v. Office of Personnel Management*, No. 09-CV-10309 (Dist. Mass filed Mar. 3, 2009). may prove otherwise. It is a carefully constructed test case and it challenges DOMA on many fronts beyond taxation.

185. *See* Cain, *supra* note 20, at 814–17 (describing the congressional response to the issues raised by the Supreme Court's opinion in *Poe v. Seaborn*).